Comments on rdSGEIS

Martha Robertson Chair, Tompkins County Legislature 320 N. Tioga St., Ithaca, NY 14850 607-274-5434 mrobertson@tompkins-co.org December 1, 2011 Ithaca, NY

The revised SGEIS is better, thanks in large part to the 14,000 public comments on the previous draft. And yet many of our most significant comments on the first version have not yet been addressed.

Our Planning Department has written comments that our Legislature will consider next Tuesday. Unfortunately whole sections of these new observations could have been taken verbatim from our 2009 comments.

For example, the document still doesn't deal adequately with cumulative impacts, even though the DEC admitted in 2010 that this gap was one of the most frequent comments by the public. Every EIS is required to focus on cumulative impacts rather than allowing segmentation. Just because it's "difficult" doesn't mean the DEC can brush it off.

The document fails to establish thresholds of activity that the human and natural environment could sustain without permanent damage. The spacing unit is the only limiting factor on development. It is the DEC's job to establish a pace and extent of development that the environment could tolerate, rather than leaving it up to the industry.

The socioeconomic analysis failed to analyze or quantify the negative impacts of drilling, a stunning omission. It doesn't address the serious long-term adverse effects of a boom and bust economy, or the costs to local governments, or issues of equity when a few people will get rich while the entire community will pay the costs. The overwhelming truck traffic will have devastating economic and social effects even if the industry eventually repairs the infrastructure.

The many continuing flaws in the SGEIS include failure to assess the industrialization of our rural landscapes, and the life cycle analysis of greenhouse gas emissions from natural gas. There still is no adequate plan for cleaning the wastewater. The failure to address the cumulative impacts is a fatal flaw all by itself.

The only conclusion that can be drawn from the document is that there are no measures that New York State is willing or able to require that would sufficiently mitigate the severe negative impacts of shale gas drilling.

Therefore, until and unless a more benign technology is developed and required, fracking should not be permitted; a total statewide ban is the only appropriate mitigation. If a total ban cannot be

achieved, the DEC should honor local home rule, as many other states currently do. Home rule would place the decision about whether to allow drilling at the local level, closest to the people who will live with its consequences. The responsibility to regulate the process of drilling itself should remain with the professionals at DEC.

Thanks to the state's moratorium and DEC's SGEIS process and public comment periods, localities are relatively well-equipped today to understand the trade-offs inherent with this industry, and can make a local decision that best meets their own needs.

DEC can and should write this support for local home rule into the SGEIS, and I am submitting tonight a memo outlining how that could be done. Municipal Home Rule has been and remains one of New York's unique and important political features. The principle has seldom been more significant to the people of the State as in this debate.

COMMENTS TO NYSDEC ON REVISED DRAFT SGEIS ON HIGH VOLUME HYDRAULIC FRACTURING IN THE MARCELLUS SHALE

Re: Resolving Potential Conflict Between Municipal Home Rule Land Use Authority and the

Department of Environmental Conservation's Regulatory Authority

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Under Article IX, section 3(c) of the New York State Constitution, Municipal Home Rule is a guaranteed right of local governments and must be liberally construed. The New York State Court of Appeals has ruled that the main purpose of such constitutionally guaranteed home rule powers rests in land use controls, and that as such, municipalities are not obligated to allow natural resource extraction under state statute.

The Department of Environmental Conservation (DEC) is a department of the executive branch and possesses no inherent legislative power, and may only promulgate rules within the boundaries of its legislative delegation. In the absence of express delegation, the DEC's exercise of legislative power is in contravention of the separation of powers doctrine.

When the legislature enacted Article 23 of the Environmental Conservation law, it thereby delegated to the DEC the authority to regulate the gas industry. There is a controversy regarding the extent and meaning of the DEC's administrative powers, and the extent to which the legislature's grant of authority to regulate the industry to the DEC with the concurrent prohibition of *local regulation* of the gas drilling industry may properly be construed to extend to empower the DEC to ignore and negate local land use and home rule legislative authority. To allow an administrative agency charged with regulating an industry to disregard the legislature's land use controls would be an impermissible delegation of legislative power; it would render the constitutional principle of Municipal Home Rule worthless and the significant land use planning efforts of towns across upstate New York as inconsequential. Even in states with a history of open natural resource extraction policies, home rule still governs natural gas drilling. States such as Texas, New Mexico, and Colorado all maintain the authority of their localities to decide whether natural gas drilling will be allowable within their respective jurisdictions.

Furthermore, the DEC does not propose to dictate to the drilling companies the order in which their lands may be developed. DEC is not involved in the *location*, pace, procedure, and intensity of drilling activities. Instead, these decisions are left entirely to the discretion of the gas drilling companies. Surely the legislature did not intend that gas drilling companies would be allowed to

determine land use across upstate New York. Absent local authority over land use, that would be the consequence, since the DEC is not governing the location of drilling activities.

Municipalities in New York State have the authority under the Constitution to decide what land uses are allowable within their jurisdiction. ECL 23-0303(1) vests authority to regulate gas, oil and mineral mining with the New York State Department of Environmental Conservation (DEC), subordinate to local land use authority. Companies poised to begin drilling for natural gas in New York dispute this local legal authority and have begun litigation to overturn it. Regardless of the outcome of litigation, the resources of many local governments in New York will be depleted, and their citizens will face financial hardship if this trend persists.

Yet, there is a way to reconcile the DEC's regulatory authority over the industry and the legislature's control over land use, which has been delegated to local municipal legislatures. The remainder of this memorandum will outline this approach.

The SGEIS, proposed regulations and/or a proposed General Permit all present avenues to accomplish a balance through recognition of local land use requirements while avoiding costly litigation. We believe the operational mechanism should be through the General Permit, but it would be best if the language were included in the SGEIS and in regulations.

- 1) Within the SGEIS: Article 8 of the ECL, commonly known as SEQRA, has necessitated the current Supplemental Generic Environmental Impact Statement (SGEIS) which DEC must adopt for the technique known as high volume hydraulic fracturing natural gas drilling. As part of that review, the DEC is required to evaluate and consider the character of the communities in which natural gas drilling is proposed to take place. This character is best determined by the individual localities, and those that have passed bans on natural gas drilling or "heavy industrial uses," statements in their zoning ordinances, and/or resolutions stating objections to the practice, have clearly shown a collective determination that such activity is not consistent with the character of their communities. Such a determination would constitute an adverse environmental impact which could not be mitigated. DEC should include this analysis and determination within the SGEIS.
- 2) In regulation: Further, as regulations have been proposed, they are the appropriate place for this issue to be addressed. DEC is charged with implementing the proper and constitutional meaning of ECL 23-0303(2); this may be accomplished by the express acknowledgment of local authority to regulate land use controls of gas, oil and mineral mining activities, or the determination by DEC that no permits shall be issued where an adverse impact to community character is determined under SEQRA, as laid out above.
- 3) The General Permit: The most effective and politically advantageous method to acknowledge community decision-making is to define and restrict activity within the General Permit for high volume hydraulic fracturing natural gas drilling. This strategy provides three distinct and profound advantages:
 - 1) It clarifies this important question, maintaining DEC's authority to regulate natural gas drilling under ECL 23-0303(1), while avoiding legal controversy with the constitutionality of local bans;

- 2) It provides DEC and the Governor a mechanism to define local opposition to the practice and satisfy localities where natural gas drilling is clearly politically toxic; and
- 3) It removes the massive burden of litigation that is otherwise sure to ensue, inundating the state's court system and costing localities and the State millions of dollars, and possibly delaying drilling for years in the places where it may be wanted by the communities.

Operationally, such a mechanism would be predicated on two simple principles:

- 1) Satisfy the localities that are clearly and unequivocally opposed to natural gas drilling; and
- 2) Maintain the permit as the legal vehicle for the expression of local control, by way of the DEC's regulatory authority.

For this to work properly, the DEC would utilize its legal authority to regulate gas, oil and mineral mining to place terms within the General Permit. As stated above, the appropriate action is to add language to the SGEIS and regulations, consistent with the General Permit on this point. The first necessary action within the Permit would be to define sufficient expression by a local government so as to convince the DEC that such activity is not acceptable to that local government. This could be by way of a local resolution passed by a town board, by zoning ordinance that prohibits heavy industrial activities such as gas drilling, by way of a local law banning such activity so long as that law remains on the books, or by petition within a jurisdiction. The next step would be for the DEC to establish a prohibition on issuance of a permit for drilling in any jurisdiction that met the definition of expressing unacceptability of drilling. The following would be a simplistic example:

GENERAL PERMIT

Section 1. For the purpose of this permit "not within community character" means any town, city, village or municipal subdivision of the state that has passed a local law, zoning ordinance, or resolution, by a majority of the members elected to such municipal subdivision's legislative body, expressing the opposition to or the prohibition of natural gas drilling or land uses including natural gas drilling within such municipal subdivision's geographical jurisdiction, and such local law, zoning ordinance, or resolution has been filed with the Commissioner. Such filed law, ordinance, or resolution may be withdrawn by the municipal subdivision upon the filing with the Commissioner of a subsequent local law, ordinance, or resolution, passed by a majority of the members elected to such municipal subdivision's legislative body, expressing the municipal subdivision's desire to rescind its previously filed law, ordinance, or resolution. This definition shall only be applicable where a local law, ordinance, or resolution is on file with the Commissioner.

Section 2. No permit shall be issued to an applicant who proposes drilling activity within a municipal subdivision of the state that has demonstrated that such activity is not within its community character as defined herein.

This mechanism will aid the Governor and DEC in identifying and satisfying the wishes of local governments while avoiding costly litigation, and preserving both home rule and state authority simultaneously. It is a win-win for New York. It places the decision about whether to allow drilling at the local level, closest to the people who will live with its consequences. Thanks to the

DEC's extensive process of analysis and public comment, localities are relatively well-equipped today to understand the trade-offs inherent with this particular industry, and can make a local decision that best meets their own priorities and needs. The responsibility to regulate the process of drilling itself remains appropriately with the professionals at the DEC.

However the mechanism is accomplished, it is important for DEC and the Governor to express support for Municipal Home Rule, as it has been and remains one of New York's unique and important political features. The principle has seldom been more significant to the people of the State as in this debate.